No. 85-645

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

LAW & TECHNOLOGY PRESS, PETITIONER

v.

RALPH OMAN, REGISTER OF COPYRIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the deposit requirement of Section 101 of the Copyright Act of 1976, 17 U.S.C. 407, is unconstitutional.

1. Section 101 of the Copyright Act of 1976, 17 U.S.C. 407, provides that "the owner of copyright * * * in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication * * * two complete copies" with the Copyright Office for use or disposition by the Library of Congress. Failure to deposit the work does not invalidate the copyright. 17 U.S.C. 407(a). However, it does subject the owner of the

copyright to a penalty of $250 plus the retail purchase cost of the undeposited copies. 17 U.S.C. 407(d).

Petitioner owns the copyright to *The Scott Report*, a periodical dealing with issues affecting the computer industry. In 1982, petitioner published nine issues of the periodical, each bearing a copyright notice. Petitioner failed, however, to comply with Section 407's deposit requirement. On October 20, 1982, the Register of Copyrights (Register) demanded that petitioner submit two copies of each issue to the Copyright Office. See 17 U.S.C. 407(d). Petitioner refused, contending that the deposit requirement was unconstitutional, and instead suggested that the Library of Congress acquire the needed issues by taking out a paid subscription to the periodical. Pet. App. A6-A7; Pet. Supp. App. SA1-SA2.

The Register then filed suit in the United States District Court for the Central District of California to recover the statutory penalties for failure to deposit. Petitioner admitted its failure to comply with the deposit requirement but asserted that the statute was facially unconstitutional. Petitioner also argued that the Register impermissibly employed selective prosecution in enforcing the deposit requirement. The district court rejected these arguments and granted summary judgment for the Register. Pet. Supp. App. SA1-SA4.

Petitioner appealed and elaborated upon its constitutional arguments. In particular, petitioner contended that the Constitution's Copyright Clause [1] does

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[1] The Copyright Clause provides that Congress shall have power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8.

not authorize Congress to impose a deposit requirement, that the deposit requirement results in a taking of private property for public use in violation of the Fifth Amendment, and that the deposit requirement curtails free expression in violation of the First Amendment. The court of appeals rejected each of those contentions (Pet. App. A6-A15). First, it noted that the Copyright Clause empowers Congress to employ copyrights to promote the arts and sciences. It concluded that the imposition of a deposit requirement for copyrighted works is a "necessary and proper" incident of that power (*id.* at A8-A10). Next, it determined that the deposit requirement does not constitute an unconstitutional taking of property. It found, instead, that the deposit requirement is a valid condition on the statutory benefit of copyright (*id.* at A10-A14). Finally, it rejected petitioner's First Amendment contentions, observing that the deposit requirement does not burden free expression (*id.* at A15).

2. The court of appeals' decision is correct, is consistent with this Court's previous decisions, and does not conflict with any decision of another court of appeals. This case does not warrant further review.

a. There is no serious question that the Copyright Clause permits Congress to impose a deposit requirement on copyrighted works. Indeed, Congress has imposed a deposit requirement on owners of copyrights since the original Copyright Act of 1790. See Act of May 31, 1790, ch. 15, §§ 3-4, 1 Stat. 125. That requirement has remained a fixture of American copyright law for nearly 200 years.[2] The current de-

[2] See, *e.g.*, Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1078; Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1107; Act of July 8, 1870, ch. 230, § 85, 16 Stat. 212. See also *Washingtonian Pub-*

posit requirement differs from its predecessors in only one significant respect: failure to comply with the requirement results in a limited monetary penalty rather than in a complete loss of copyright protection. See 17 U.S.C. 407 note.[3]

As this Court has stated, "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429-430 (1984). Congress, of course, has necessarily broad latitude in exercising that authority. See *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966); see also, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Congress has determined that the underlying purpose of the Clause—promoting the arts and sciences for the general public good[4]—is advanced by requiring authors and artists who publish their work with notice of copyright to provide copies to the Library of Congress. This requirement provides the public with access to copyrighted materials while imposing a de minimis burden on those who realize the financial ben-

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lishing Co. v. *Pearson*, 306 U.S. 30, 44 & n.4 (1939) (Black, J., dissenting).

[3] Petitioner incorrectly asserts (Pet. 5) that 17 U.S.C. 407 imposes a "new and unprecedented *library* deposit requirement." Actually, as the court of appeals noted (Pet. App. A10), copyright deposits have been entrusted to the Library of Congress for its use and benefit since 1846. See Act of Aug. 10, 1846, ch. 178, § 10, 9 Stat. 106. See also *Washingtonian Publishing Co.* v. *Pearson*, 306 U.S. 30, 36-41 (1939); *id.* at 48-51 (Black, J., dissenting).

[4] See, *e.g.*, *Sony*, 464 U.S. at 428-429; *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975).

efits of copyright. It plainly represents a reasonable exercise of Congress's constitutional prerogatives.[5]

b. Petitioner's contention that Section 407's deposit requirement represents an unconstitutional taking is insubstantial. Congress, in establishing a system of copyrights, can specify the terms and conditions that attach to the grant of copyright protection. See *Sony*, 464 U.S. at 429-430; *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346 (1908); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 660-661 (1834). Congress has determined that those who seek the benefits of copyright protection must comply with a deposit requirement. The deposit requirement, imposing a minor regulatory burden on copyright owners, does not amount to a taking of private property. Instead, it is simply a valid condition upon the grant of a statutory benefit. See *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 16-19.

Contrary to petitioner's assertions (Pet. 11-13), when an owner of a copyright publishes his work with

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[5] As Justice Black noted, the deposit requirement represents, in part, Congress's intention "to preserve 'desirable or useful' works in a governmental agency dedicated to the diffusion of public knowledge." *Washingtonian Publishing Co.*, 306 U.S. at 49 (footnote omitted) (Black, J., dissenting). This purpose has been recognized since the original Copyright Act of 1790, which required, in addition to the general deposit requirement (§ 3, 1 Stat. 125), that a copy of a work be delivered to the Secretary of State "to be preserved in his office" (§ 4, 1 Stat. 125). See *Washingtonian Publishing Co.*, 306 U.S. at 50 (Black, J., dissenting). The courts are obligated to give great deference to congressional judgment in continuing the long established deposit requirement. See *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13-14.

notice of copyright he invokes the protection of the copyright laws. Under the Copyright Act, a copyright attaches to an original work of authorship once it is fixed in a tangible medium of expression. See 17 U.S.C. 102. Nonetheless, if an owner wishes to maintain copyright protection of a published work, he must affix a copyright notice to each copy. See 17 U.S.C. 401.[6] Thus, by publishing a work with notice of copyright, an owner voluntarily engages the statutory mechanism for preserving copyright protection.

The Copyright Act provides, quite reasonably, that one who seeks to protect a copyrighted work through notice of copyright must comply with the deposit requirement. See 17 U.S.C. 407 & note. As previously discussed, the deposit requirement is a familiar fixture of American copyright law that advances the government's legitimate interest in promoting the arts and sciences. It does not constitute a "taking"; instead, it represents a minor imposition upon those who seek the substantial financial benefits of copyright protection. As the court of appeals explained (Pet. App. A12-A14), one who voluntarily participates in a statutory scheme specifically designed to protect legislatively conferred rights can be required to comply with accompanying conditions of that scheme. See *Ruckelshaus* v. *Monsanto Co.*, slip op. 16-19. Petitioner, by choice, enjoys the economic advantages of copyright protection; it must, in exchange,

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[6] If an owner fails to comply with the notice requirement, he can cure the omission by registering the copyright and making reasonable efforts to add a copyright notice to publicly distributed copies. 17 U.S.C. 405. See, *e.g.*, *Werlin* v. *Reader's Digest Association, Inc.*, 528 F. Supp. 451, 460-461 (S.D.N.Y. 1981).

comply with the de minimis burdens of the deposit requirement.[7]

c. Petitioner argues (Pet. 18-21) that the deposit requirement violates his First Amendment rights. That claim is meritless. As previously discussed, the Copyright Clause authorizes Congress to enact legislation governing copyright and permits imposition of the deposit requirement. Furthermore, the deposit requirement does not burden the expression and dissemination of ideas; it simply imposes a minor regulatory requirement upon copyright owners who publish works with notice of copyright and voluntarily claim the statutory benefits of copyright protection. Finally, this Court has cited with approval federal district court decisions holding that federal copyright law does not restrain the use of an idea or concept within the meaning of the First Amendment. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[7] Petitioner contends (Pet. 15-18) that the deposit requirement interferes with its exclusive right of distribution, citing *Belknap* v. *Schild*, 161 U.S. 10 (1896), and *James* v. *Campbell*, 104 U.S. 356 (1881). As the court of appeals correctly noted (Pet. App. A13), those cases are inapposite. They involve patent infringement actions in which government agents used patented devices for the same purposes that private parties would use the devices. Here, Congress has imposed the deposit requirement as a condition of copyright protection, and as an incident of its power under the Copyright Clause to promote progress in the sciences and useful arts.

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